Shaw's Supermarkets, Inc. ***and*** **United Food and Commercial Workers Union, Local 791, AFL–CIO.** Case 1–CA–37507

May 10, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On September 13, 2000, Administrative Law Judge Raymond P. Green issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent also filed cross-exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Dated, Washington, D.C. May 10, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

William B. Cowen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent did not violate the Act by refusing to execute a collective-bargaining agreement, we agree with the judge that the record evidence does not establish that the document submitted by the Union to the Respondent in November 1998 reflected a meeting of the minds assertedly reached by the parties on June 26, 1998. The judge also found that the Respondent's interpretation of the agreement reached by the parties on June 26, 1998, was correct. We find it unnecessary to pass on this latter finding.

A. Susan Lawson Esq., for the General Counsel.
David E. Watson Esq. and *Thomas Colomb Esq.*, for the Respondent.
Warren H. Pyle Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Boston, Massachusetts, on June 5 to 8, 2000. The charge was filed on August 18, 1999, and the complaint was issued on December 29, 1999. In substance, the complaint alleges that on June 26, 1998, the company and the Union reached complete agreement on the terms and conditions of a collective-bargaining agreement, that "the agreement" was tendered to the company on November 23, 1998, for execution, and that since that date the company has refused to execute the tendered document.[1]

The Respondent agrees that the parties entered into a collective-bargaining agreement on June 26. The company contends, however, that the document tendered to it for execution, almost 5 months later, was not consistent with what the parties had agreed to on June 26, 1998.[2]

Interestingly, on June 26, 1998, both parties executed a set of documents which comprises a complete agreement. Moreover, it is not disputed by either side that they have been living successfully under that agreement since that date. There is, in my judgement, no pressing need for any other document to be executed even if the parties may disagree as to any portion of the contract's meaning. That is what arbitrators are for.

The crux of this dispute involves Article 39 which relates to medical and dental insurance. In essence, the Union contends that the parties agreed that the employees in the bargaining unit would be covered by the benefits and conditions of the company's existing plan to which they had previously belonged before the election, and that the benefits and conditions as they existed at the time of the agreement would remain frozen and not subject to change during the life of the collective-bargaining agreement. The company contends that the Union agreed that the employees would continue to be covered by the company's plan which means that they agreed that the plan could be altered or modified at the discretion of the company, as had happened in the past.

The General Counsel makes an ancillary argument which I am not sure I understand. She contends that via the doctrine of equitable estoppel, the Respondent cannot refuse to execute the

[1] I note that the Respondent contends that the complaint is barred by the 10(b) statute of limitations inasmuch as the complaint alleges that the refusal to execute the agreement took place on or about November 23, 1998, and the charge was filed more than 6 months later. The fact is, however, that the company did not clearly and unambiguously notify the Union that it would refuse to execute the proffered document until some time later and within the statute of limitations period. See *Liberty Ashes Inc.*, 314 NLRB 277, 279 (1994). In this regard, the first inkling that the company did not agree with the Union's version of the contract took place during negotiations at another bargaining unit, on or about February 24, 1999, and the evidence shows that the company unambiguously notified the Union of its opposition to the Union's draft contract on May 3, 1999.

[2] Indeed, the company filed an 8(b)(3) charge against the Union alleging that the Union violated the Act by seeking to change the terms of the agreed on contract. That charge was, however, dismissed by the Regional Director.

Union's version of the contract which was proffered to the company on November 24, 1998. If she is merely saying that the proffered document is consistent with the previously executed agreement and simply fleshes out (interstitially), the agreed on language of that contract, then she would have a point. If, however, she is contending that the proffered document is a modification of the previously signed contract and that the Respondent, by the actions of its agents, agreed to amend that contract, then this theory is, in my opinion, not consistent with or covered by the complaint. After all, the complaint alleges that the final contract consists of what had been agreed to on June 26, 1998. That is, a contention that the parties subsequently amended the June 26 agreement, is not alleged in the complaint.[3] For a variety of reasons discussed below, I reject this theory of the case.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the excellent briefs of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the charging party, United Food and Commercial Workers Union, Local 791, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent, Shaw's Supermarkets, Inc., operates a chain of supermarkets in the New England area. Some of its stores and distribution centers are unionized and some are not.

In relation to its nonunionized facilities, the company established and has maintained a health and dental plan. (They are collectively called the "company plan".) Employees of the company, not otherwise covered by health plans established pursuant to collective-bargaining agreements, are eligible to participate in the "company plan."[4]

There is a plan document which is required by ERISA and a document called a summary of benefits, which pursuant to law, is made available to employee participants and which describes eligibility requirements and plan benefits. It is important to note that the plan, both as to eligibility requirements and benefit levels, changes from year to year and the company publishes a yearly update of the summary of benefits which serves to notify employees of any changes. Annual changes are made unilaterally and the right to make such plan amendments are set forth in the plan document (sec. XII at p. 49 and the Plan Summary at p. 28).

The "company plan" provides three levels of benefits. The principal level is called "Best Care" which most full-time employees elect. The next and lower level is called "Better Care" which provides lower benefit levels or requires higher doctor copay levels for participants. The lowest level is "Basic Care." At each level, an employee can choose single coverage, two person coverage or family coverage. For the Best Care and Better Care options, the cost of coverage is shared by the company and by employees through a payroll deduction. Full-time employees can elect to opt out of the "company plan" and if they do, they receive an amount of money in addition to their normal wages. (This latter option would typically be taken by employees who are covered by medical plans of their spouses.)

Although the "company plan" has been referred to as the nonunion plan, this is something of an anomaly because, in some situations, unions representing employees at some of Respondent's locations, have opted to choose the "company plan" as the mechanism for providing medical and/or dental insurance to represented employees. The company has expressed a desire to set up a jointly administered health and dental plan; one that would be governed by the provisions of Section 302 of the LMRDA. The reason for this, as stated by the company's benefits expert, is that the company is tired of squabbling over the various plans, benefit levels and costs and would like to have the providing of health and dental insurance turned over to a set of trustees, half of whom would be selected by the Union.

The facility involved in the present case is called the Wells Distribution Center and it is a warehouse distribution facility located in Wells, Maine. It employs about 250 to 300 workers. On February 12, 1997, the Union won a Board conducted election and was certified as the exclusive collective-bargaining representative.

Negotiations between the company and the Union commenced on April 15, 1997. The Union was represented by Michael Fox, Mary McClay, Malcolm Fulford, Robert McClay, and Robert Anderson. Also participating were five rank-and-file employees from the Wells Distribution Center. The Union's chief spokesperson was Michael Fox who was the Union's director of collective bargaining. Notes were kept of the negotiations by various members of the Union's team and it should be noted that the notes of Mary McClay were particularly comprehensive and detailed. She testified that any time the Union or the company made a contract proposal or counterproposal, she recorded that fact and the details thereof.

The company was represented by Richard Pires, Robert Groebel, Steve Kumka, Bruce Tirrell, and Roger Bousseau. The company's spokesperson was Richard Pires who, at the time of the negotiations, was Vice President of Labor Relations. At various times during the negotiations when benefits were discussed (particularly medical benefits), Hugh Penney was brought in by the company as he is the vice president of compensation, benefits, and human resource information systems. (i.e., the expert on benefits.)

The first time that the parties exchanged written proposals regarding medical and dental benefits occurred on October 27, 1997. The Union's proposal was a "hybrid" plan combining some elements of the "company plan" along with some elements from a union negotiated plan covering certain employees in the company's Southern Region. The Union proposed that employees not be required to contribute any money to pay for the benefits and that they not be liable for any copayments to medical providers. The company proposed that the bargaining unit employees remain in the existing "company plan", (the so-called nonunion Northern Region plan), and that future costs of the plan be split between the company and employees in the ratio of 70/30. Hugh Penney told the union representatives that the company was not willing to carve out the Wells unit of

[3] There is, of course, nothing that would prevent a union and an employer from altering a collective-bargaining agreement during mid term. However, under the specific provisions of Sec. 8(d) of the Act, they may only do so by mutual consent. But that is not what is alleged in this complaint.

[4] This plan is officially referred to as the "Best Care Enhanced Plan."

employees from the existing "company plan". At this meeting, Penny credibly testified that under the company's proposal, if the union elected to remain in the "company plan", the company retained the right to make changes to the plan. Indeed, Penney notified the union representatives that there were certain potential changes that the company was contemplating effective January 1, 1999.

On December 30, 1997, the Union complained that the company had unilaterally increased the cost of health insurance benefits for the unionized employees at the Wells Distribution Center. Subsequently, the Union filed an unfair labor practice charge concerning this alleged change and the company entered into a non-Board settlement of the matter.[5]

June 12, 1998, was the next time that the parties returned to the subject of health benefits. At that meeting, the company tendered a proposal, (GC Exh. 4), which explicitly stated:

> Wells Distribution Center Associates will continue to be eligible for Shaw's Northern Region health & welfare and retirement benefit plans. Costs will be the same as those in effect in Shaw's Northern Region.
> *There could be changes in the plans in the future due to changes in vendors, rates, plan experience, or vendor requirements*. (Emphasis added.)

Attached to the letter was a list of possible changes that might be made to the plan in the coming year.

At the meeting on June 12, Penney stated that the company's proposal was designed to keep the unit employees in the company's existing plan and that the company reserved to itself the right to make changes to the plan in the future. In this respect, he said that the bargaining unit employees would be affected by such changes as the company did not want to carve out a separate plan for them. (If everyone else, except for the 300 Wells employees, were affected by changes to the "company plan," then the Wells employees would no longer be part of the plan after such changes were made, as their benefits would then be different from those contained in an amended "company plan".) Penney described the potential changes that were previously described in the letter. He credibly testified that he told the Union that any enhancement in benefits would automatically be given to the Union's members and that the company would meet and discuss with the Union any potential negative changes. Penney credibly testified that neither he nor any other company representative agreed that any future changes made to the "company plan" would require union consent.

Union representatives Fox and McClay testified that at the June 12 meeting, they specifically rejected the idea that if the Union accepted the "company plan", that the company could therefore make future changes to the plan insofar as such changes affected the Wells bargaining unit. The bargaining notes of McClay and Fox do not, however, reflect such a rejection.

Before moving on to the next series of bargaining sessions, I should note that there is no evidence at all that the company ever *withdrew* its June 12 proposal that if the Union accepted the "company plan", the company retained the right to make changes in plan benefits and design during the life of the collective-bargaining agreement. The evidence, therefore, does not contradict the testimony of Respondent's witnesses to the effect that at no time during the bargaining or thereafter, did the company ever agree to maintain the same level of benefits or plan design for this single group of employees for the duration of the contract. There is, in my opinion, simply no evidence to warrant the conclusion that the company's negotiators agreed to freeze for 3 years, and for only the employees at Wells, the benefit levels or plan design of the "company plan" as it existed as of June 26, 1998. And the bargaining notes of McClay and Fulford are not inconsistent, as they simply indicate that at the June 12 meeting, the company merely offered to have the employees continue in the current "company plan" and retain all existing benefits under that plan. Nothing in their notes can be interpreted to mean that the company agreed to freeze benefits for the term of a contract.

Company negotiator Pires testified that in late May or early June 1998, he told Russ Regan, President of Local 791 that it was important to the company that the Wells group not be carved out of the "company plan" and stated that if the plan was later modified it would be due to a modification for the entire Northern Region. Regan did not testify in this proceeding

The next meeting was held on June 16, 1998. The Union tendered a counter proposal (GC Exh. 5), which, while proposing to accept the company plan's benefits, also proposed to eliminate any employee contributions. Without going into all the details of this proposal, the General Counsel points out that in the upper left hand corner of the document is the phrase; "Medical Plan 1998-term." This, according to McClay, was inserted to indicate that the Union was proposing that the benefit levels of the "company plan" would be frozen during the term of a collective-bargaining agreement. Unfortunately, the Union's chief negotiator, Fox, testified that he couldn't say what this phrase meant and the company negotiators credibly testified that they didn't even notice the phrase when it was received. There was no discussion of it at the meeting.

At the June 16 meeting, company negotiator Pires suggested that if the Union did not want to have the employees continue in the "company plan," the company could design a completely new plan but, as the insured group's size was so small, the deductibles and copayments required for the employees would be very high. This idea was dropped.

During negotiation sessions held on June 17, 18, 19, 22, and 23 the parties exchanged proposals and counter-proposals on various issues including health benefits. There was no evidence that the company agreed to freeze health benefits for the duration of the collective-bargaining agreement.

On June 24, 1998, the discussion focused, as it had since June 17, on how much the employees should contribute as their share of the cost of the medical and dental plan. (The Union had previously insisted that employees should incur no cost and the employer insisted that there be a sharing of the cost.) The company tendered a "Summary of Benefits" which set out the current benefit levels for the Wells and Northern Region employees. This was turned over merely in order to illustrate what the current level of benefits were for the bargaining unit employees. The Union, for its part tendered a proposal (GC Exh. 13), which, in connection with the health insurance plan, states; "Company plan OK." This language is different for the language used by the Union in relation to other benefits such as 401(k), Life Insurance, RAP, and Disability, where the Union's proposed language stated: "union agrees to existing plans for the duration of the contract." (Regarding the medical plan, the

[5] I don't think that the details of the alleged unilateral change and the settlement of that charge have much, if any relevance to this case.

Union's proposal contains the language that the weekly employee *contributions* then in effect would continue as agreed for the duration of the contract.) Thus, the company argues that at the June 24 meeting, the Union's health proposal essentially was one where the Union was willing to accept the "company plan" as is, but wanted to freeze, for the duration of the contract, only the amount that employees would have to contribute to the plan depending on the level of benefits that they opted for.

On July 25, 1998, the Union presented two more health insurance proposals, both centering on the current and future employee contribution levels. Both stated; "Company plan OK." At this meeting, the Union agreed to continue the dental plan then in effect for the Wells employees. Also, the parties agreed to insert into the contact a provision borrowed from another collective-bargaining agreement which called for meetings in July 2000, to discuss health care costs. Hugh Penney testified that this language, which was proposed by the company, was intended to move toward the ultimate goal of creating a Section 302, jointly administered trust fund.

On July 26, 1998, the parties reached a final agreement. A one-page document was signed by Fox for the Union and Pires for the company. This document (GC Exh. 16), reads:

> Health & Welfare – company plan OK – settled
>
> Best Care weekly contributions $3, $6, $9 for the duration of the contract – settled
>
> Better Care $0 for duration – full time—settled
>
> No 70/30 split for future increases – settled
>
> EBDC Article 10 paragraph G Page 28 – settled[6]
>
> DentalCare Plus weekly contribution $1.63, $3.27, $4.98 for the duration of the contract – settled
>
> No 70/30 split for future increases – settled
>
> Basic Dental (current Wells plan) for short-term disability changes already agreed to – settled
>
> 401(k), RAP, Life Insurance, Disability – union agrees to existing plans for the duration of the contract except for short-term disability changes already agreed to – settled.
>
> Employee optional plans agreed to 6/16/98 – settled

The final agreement was ratified by the Union's membership on June 28, 1998. Per historical practice, it was the Union's job to prepare a final draft of the new labor contract. In the meantime, the separately signed documents which comprised the contract made on June 26, 1998, were reassembled by union representative McClay in an attempt to put the separate agreements into an organized form. Respondent Exhibit 2 is a set of the separately signed documents comprising the actual contract as they were signed (i.e., in chronological order). Respondent Exhibit 3, tendered to the company in July 1998, is a set of the same documents (unsigned), rearranged into a more cohesive form. (The rearranged R. Exh. 3 contains substantially the same language that is quoted above in relation to the health and dental plans.)[7] In either case, there is no dispute that the company and the Union have subsequently conducted their affairs in accordance with the substantive terms of the June 26, 1998 agreement.

During the summer of 1998, the Union learned that Pires intended to leave the company. Notwithstanding his efforts to get the Union to have a contract draft finalized, this did not happen. It was only until after Pires left the company that McClay finally put together a final draft and mailed it to the company on November 24, 1999. (Received on November 25.) This was 5 months after the contract had been made and the document was mailed to Ruth Bramson who is the Senior Vice President of Human Resources.[8]

As noted above, the Union's contract draft, as to everything other than health and dental insurance, merely copied the language of the various agreements that had been executed during the negotiations that concluded on June 26, 1998. However, as to article 39, instead of simply copying the executed language, McClay took the company's previously provided summary of the "company plan" and inserted the specific benefits into the proposed draft contract. In the covering letter, the Union asked that the company respond by December 7, 1998, which was five working days after its receipt.

At the time of receipt, the Respondent had hired Eric Nadworny to replace Pires but he did not actually arrive at the company until December 1, 1999. At the time of his arrival, he had a number of substantial projects on his plate.[9] At the same time, the Union's draft was put into his possession, but was not accorded a high priority by him at the time. He credibly testified that in light of his other priorities, he merely glanced at the proposed contract, noticed that it had Pires' name on the signature page and instructed his new secretary, Cheryl Vallarelli, to call and inform the Union that he, not Pires, was going to be the one to sign a contract.

Cheryl Vallarelli, at the time, was a high school graduate with no prior experience in labor relations and had no involvement in any contract negotiations. She became a secretary in this department in July 1998, shortly before Pires left the company.

Union representative McClay testified that on December 4, 1998, she returned a phone call from Vallarelli and was told by her; "Eric said the contract was fine, except to change Rich Pires' name to Eric Nadworny." Based on this alleged phone conversation, the General Counsel asserts that Nadworny, via Vallarelli, approved the Union's draft contract and therefore is bound to accept that document as being the agreement made on June 26, 1998.

Apart from the fact that Vallarelli had no authority to approve or accept a collective-bargaining agreement and the fact that there is no evidence, apart from the alleged phone conver-

[6] This refers to the language about meetings in July 2000.

[7] There were some minor nonmaterial differences between R. Exh. 2 and R. Exh. 3 that were not discovered by company representatives until this case was actually in litigation.

[8] Essentially all that had to be done was to copy all of the singly signed documents and put them together into an overall contract. Virtually all of the provisions of a final contract, perhaps with the exception of art. 39, dealing with health care, could simply be copied. Even art. 39 could simply have read, in pertinent part, that the bargaining unit employees would be covered by the "company plan".

[9] On arrival at Shaw's, Nadworny had to deal with ongoing negotiations with UFCW, Local 1445 for a unit of meatcutters in Worcester, Massachusetts; ongoing negotiations for a contract covering clerks in East Bridgewater; ongoing negotiations for a contract extension with Local 371 in Connecticut and preparation for negotiations with the Charging Party that were to commence in January 1999, at Methuen. In addition, Shaw's had taken over Star Markets a company which employed over 10,000 workers in 50 stores and had a unionized distribution center.

sation with McClay, that Nadworny authorized Vallarelli to approve the contract, I simply do not believe McClay's testimony on this point.

Vallarelli, in my opinion, was an honest witness who credibly testified that all she did was relay the message that Nadworny and not Pires was to be the person to sign a contract on behalf of the company. She credibly denied that she told McClay that Nadworny had approved or accepted the Union's version of the contract. And in this respect, I note that after this alleged conversation, neither McClay nor any other union representative chose to confirm this alleged conversation either orally or in writing with Nadworny or any other company representative. Nor did McClay, who otherwise kept careful notes, make any record of this alleged conversation.

Nothing in relation to this issue happened until after the parties started to negotiate a contract at a different distribution center in Methuen. That is, there was no communication from the Union asking the company to execute the proffered contract and no communication from the company indicating that it was refusing to do so.

During negotiations concerning the Methuen employees, Nadworny was the company's chief negotiator and Fox was the chief negotiator for the Union. As in the negotiations for the Wells contract, McClay was the chief note taker for the Union and Penney was the person called in by the company for expertise on benefit plans.

On February 23, 1999, the Union proposed that a contract for Methuen employees incorporate the agreed on Wells medical and dental plan. (art. 38 in the Union's proposed contract at Methuen corresponds to art. 39 in the Wells agreement.) According to Nadworny, he instructed Penney to draft language and Penney testified that at the time, he was not aware of the draft contract that the Union had sent on November 24, 1998.

Various union witnesses testified that at the February 23, 1999 meeting, and in connection with discussing the idea of having the Methuen contract adopt the Wells contract language on health and dental benefits, the Union printed out its version of the contract language and handed it to the company's representatives. This was denied by the company and there was a good deal of contradiction in the testimony of the Union's witnesses. McClay testified that she printed out the language from her laptop and gave it to someone else who delivered it to the company's representatives who were in caucus in another room. Another union representative, Fulford testified that McClay gave him the printed language whereupon he went to make a number of copies, gave them back to Fox, who in turn gave a copy to each member of the company's negotiation team including Nadworny. I note that despite the uniform practice of Fox and McClay to make a notation whenever a proposal is given by one side to the other, neither's bargaining notes reflect that this tender ever happened.

On February 24, 1999, Nadworny presented language for medical and dental benefits (R. Exh. 6), which stated, inter alia; "The company fully retains the right to modify plan design and vendors." This, according to Nadworny and Penney, was what they understood to be the agreement that had been reached between the Union and the company in the Wells negotiations back in June 1998. In subsequent company proposals during the Methuen negotiations, the company stuck by its proposed language which gave it the right to modify plan design and vendors.

The Methuen negotiations eventually led to a "handshake" agreement on February 27, 1999, but as in this case, the parties disagreed as to what they agreed to in relation to the health and dental benefits. Both sides filed charges against the other but the Regional Director and the General Counsel, on appeal, dismissed both sets of charges and concluded that the parties had not reached a meeting of the minds.

At some point on or about March 18, 1999, the Union, without having obtained a company signature on the draft contract that it had proffered on November 24, 1998, sent the draft to the printer. It did so without notifying the company and ordered 1200 copies of the document.[10]

According to Penney, sometime in April,1999, he was in Nadworny's office and after reviewing the Union's proffered version of the contract, (GC Exh.19), he first noticed that the language of Article 39 was different from what had been signed on June 26. 1998. (To repeat the obvious *there is no dispute* that the language in the November 24, 1998 draft contract was, in fact, substantially different from the language in the document executed by both parties on June 26. The question here is whether the new language is consistent with or different from what the parties had agreed to on the earlier date.)

Thereafter, Penney drafted language covering articles 37, 38, 39, and 40 which Nadworny sent to the Union on May 3, 1999. With respect to Article 39, which is the provision in dispute in this case, the company's draft language made it clear that the company reserved the right to make changes during the life of the collective-bargaining agreement. Thus, at Section 3, the language states: "Health and Dental Benefits are provided under the same eligibility and guidelines as the Company offers to other facilities in Maine. Plan provisions, eligibility and insurance companies may change."[11]

On June 8, 1999, the parties met to discuss the differences in their respective assertions as to what the June 26, 1998 contract consisted of. Penney stated that it was the company's understanding that insofar as Article 39, (medical and dental benefits), the agreement provided that the parties had only locked in, for the life of the contract, the contribution rates, but that the plan's design and benefit levels could change. The Union's representatives disagreed.

On June 14, 1999, another meeting was held to discuss the Wells contract. At this meeting, the Union and the company reviewed the various signed documents which comprised Articles 37, 38, and 40. And even though Penney had proposed modifications of the language in those particular signed documents because he felt that they represented mutual mistakes, Nadworny agreed that the signed documents, as incorporated into the Union's November 24, 1998 draft, would be control-

[10] In my opinion, a letter sent by Vallarelli to McClay stating, "once printed, I would like sixty copies of the Wells contract," is not inconsistent with the fact that the company was not notified ahead of time as to when a contract would be printed. Nor is it inconsistent with the company's assertion that the document proffered on November 24, 1998, was inconsistent with what had been agreed to in the negotiations. The credited testimony is that Nadworny and Penney understood that there was in fact, an agreement, albeit one that was different from what is contained in the Union's version.

[11] Instead of describing the plan as the "company plan" or the "Northern Region" plan, the language stating that benefits would be the same as offered to other facilities in Maine, was chosen because the Northern Region no longer existed as an organizational entity and the phrase "non-union" plan was felt to be inappropriate as it would be covering union and nonunion employees alike.

ling because the draft had the same language as the documents that had been mutually executed by both parties during the actual negotiations. That is, Nadworny's position as to these three provision (arts. 37, 38, and 40), was that as the executed documents were the same as the provisions in the Union's proffered November 24, 1998 draft contract, the language should prevail irrespective of whether it resulted from mutual mistake. However, as to article 39, which in the November 24 proffered contract, was substantially different from the agreement executed back in June 1998, the company's position was that the Union's proposed language did not represent what had been agreed to in the negotiations.

I note here that the fact that the Union paid for the printing of a contract in booklet form is really of no consequence if it did not reflect the agreement of the parties. Had the parties agreed on a change in language after delivery of the booklet, it would have entailed no hardship to confirm that change either by an exchange of letters or by a mutually signed document.

ANALYSIS

Section 8(d) of the Act imposes a mutual obligation on employers and unions to bargain in good faith. This duty includes the obligation to reduce any oral agreement to writing and to execute any contract that is negotiated. Section 8(d) states:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Even prior to the enactment of Section 8(d), the Supreme Court reached essentially the same result in *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). In that case the Court held that once the parties have reached an oral agreement, the employer may not refuse to sign it. The Court stated:

> The freedom of the employer to refuse to make an agreement relates to its terms in matters of substance and not, once it is reached, to its expression in a signed contract, the absence of which, as experience has shown, tends to frustrate the end sought by the requirement for collective bargaining. A business man who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aims of the statute to secure industrial peace through collective bargaining.

Unlike other cases where one party has refused to execute a contract and where the issue is whether there was a meeting of the minds, this case is somewhat unusual because *both* sides assert that there was, in fact, a binding agreement. Although there is a signed set of documents executed by both sides which comprises the agreement made on June 26, 1998, the company and the Union disagree as to the meaning of that document.

On one hand, the company asserts that the document means exactly what it says; that the parties agreed that the employees at the Wells warehouse would be covered by the "company plan" for medical and dental insurance which, by definition of the plan, means that its benefit levels and plan design could be changed by the Respondent during the life of the agreement. (The company does not contend that it would unilaterally and without notice or bargaining, change benefits during the life of the agreement.)[12] On the other hand, the Union asserts that the parties understood the June 26 agreement to mean that the benefits contained in the "company plan" as they existed on June 26, 1998, would remain frozen for the life of the collective-bargaining agreement. Thus, it is the Union's position that at no time during the life of the agreement could the company change the plan's benefits without the Union's consent, irrespective of whether the parties bargained about proposed changes.

In my opinion, the evidence establishes that the company's interpretation of what had been agreed to is correct and that the document tendered for execution in November 1998, did not reflect what had been agreed to at the bargaining table. Accordingly, I conclude that the Respondent did not violate the Act by refusing to sign the Union's proposed draft contract.

The evidence, as reviewed above, shows that the "company plan" by its terms was a health insurance program which was subject to change or modification. And indeed, the facts showed that the company had made various changes in the past.

The evidence also shows that the company, during the negotiations with Local 791, made a written proposal on June 12, 1998, which explicitly stated that "there could be changes in the plans in the future due to changes in vendors, rates, plan experience, or vendor requirement." Although there was testimony by union witnesses that they rejected this concept, they also concede that at no time during the subsequent negotiations did the company retract this proposal. In fact, most of the bargaining after June 12, 1998, did not deal with the actual benefits of the plan, which I believe were a given, but to what extent employees would be required to contribute to the plan's costs.

On July 26, 1998, the parties executed a document expressing their agreement on health benefits. In pertinent part it stated: "Health & Welfare—company plan OK—settled." To me, the plain meaning of this phrase is that the Union agreed that the employees would continue to be covered by the "company plan" which, because the plan itself was subject to change and because the company had never withdrawn its proposal that it had the right to make plan changes, meant that the Union agreed to all the conditions of the plan including the company's right to make modifications during the lifetime of the collective-bargaining agreement. Any other construction of this language would mean that if the company changed plan benefits or design for the thousands of other nonunion employees, as it had

[12] Whether the company would have had the right to unilaterally and without bargaining, change plan benefits during the life of the collective-bargaining agreement is a hypothetical question and not an issue before me in the context of this Complaint. As to whether an agreement stating that the Union accepts "the company plan" constitutes a waiver of the right to bargain over mid-term changes, this is a somewhat controversial question. See *BP Amoco Corp. v. NLRB*, 162 LRRM 2889 (D.C. Cir. July 11, 2000) denying enf., to 328 NLRB 1220. Because this question is not one which, in my opinion, is before me in the context of this complaint, I have not commented on the General Counsel's interesting discussion of this hypothetical possibility.

the right to do, the Wells unionized employees would, at such moment, no longer be part of the "company plan" because the plan itself would have changed to something else.

Instead of attempting to spell out the specific benefits of the "company plan" and putting them into a collective-bargaining agreement, language which would have reflected the parties agreement on June 26, 1998, could simply have stated that the Wells employees would be covered by the "company plan."

For whatever reason, the Union did not get around to putting together a final draft of the Wells contract until late November 1998. And it did not send a copy of that draft to the company until more than 5 months after the agreement had been reached and at time when the company's chief negotiator no longer was employed. I do no credit the testimony of McClay that Nadworny's secretary, Vallarelli, told her on December 4, 1998, that the company had approved the Union's draft contract. For one thing, I viewed Vallerelli as an honest witness. For another, I think that it was not proven and highly improbable that Nadworny, who had just arrived on the job, would have authorized Vallerelli to express his approval of the collective-bargaining agreement. Moreover, it is noted that despite McClay's penchant for keeping detailed notes, she did not have any memoranda or notes confirming this alleged conversation with Vallerelli. The evidence shows that at no time after this alleged conversation did McClay, or any other union representative, write a confirmatory letter or otherwise communicate with any company representative to confirm that the Union's draft was accepted. Finally, as I have concluded that the Union's November draft was not consistent with what had been agreed to on June 26, 1998, any alleged conversation between McClay and Vallerelli would ultimately be irrelevant.

I have already related my thoughts regarding the General Counsel's estoppal theory. As noted above, the complaint alleges that the agreement is the one that was made on June 26, 1998. As the November 1998 union draft was, in my opinion, incompatible with what the parties had previously agreed to, there is no room to conclude that at a time subsequent to June 26, the parties had agreed to modify the June 26 agreement. There is, in my opinion, nothing in the complaint and nothing in this record to suggest that the company, by operation of some principle of "estoppal," would be obligated to execute a document which does not conform to what had been agreed to on June 26, 1998.

There was a good deal of testimony regarding a separate and later set of negotiations between the Union and the company for a group of employees at Methune. In light of the foregoing conclusions, it is apparent to me that this evidence is largely irrelevant. Yet even here, the evidence would, in my opinion, tend to support the company's view because as early as February 24, 1999, when presented with a proposal to incorporate the Wells medical benefits agreement into a Methune contract, the company's written response included the phase that; "The company fully retains the right to modify plan design and vendors."

For the reasons stated above, it is my conclusion that the November 1998 draft contract that was tendered to the company did not accurately reflect what the parties had agreed to on June 26, 1998. Therefore, I find that the Respondent did not violate the Act by refusing to execute that document.

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 13, 2000

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.